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Review of “The Interstate Commerce Commission, Part IV,” By I. L. Sharfman

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BOOK REVIEWS

THE INTERSTATE COMMERCE COMMISSION, PART IV. By I. L. Sharfman. New York: The Commonwealth Fund, 1937. Pp. xiv, 550.

The text of this concluding volume of Professor Sharfman's monumental study of the nation's outstanding regulatory body is devoted to a discussion of the Interstate Commerce Commission's organization and procedure and to a conclusion which summarizes the author's views as developed in the project as a whole. Only 388 pages are devoted to text, the remainder being occupied by an index and table of cases for the volume and by a consolidated index and table of cases.

Except in his conclusion, Professor Sharfman, in this volume, remains in the fields of law and administration and does not enter that of the economist, which is his own particular province. Substantive policies are not discussed in the body of Part IV. It is significant that this entire "study in administrative law and procedure," under the auspices of the Legal Research Committee of the Commonwealth Fund, should have been undertaken by an economist whose interest, presumably, lay principally in the policies evolved by the Commission. These have been dealt with previously in Part III.¹ But it was obviously impossible for the Commonwealth Fund to appraise procedure except in terms of the results to which it led or for Professor Sharfman to examine the working of economic policy in railroad regulation without understanding the mechanism through which it was being effectuated. Hence of necessity, one assumes, discipline were merged in making the study, as they must be in any attempt to understand the phenomena of the Great Society.

Professor Sharfman moves with a sure step from issues of organizational efficiency to questions of the value and demands of quasi-judicial procedure and back again. He is fully aware of the need both for effectuating public policy and for protecting private interest, as well as of the respective roles of Congress, Commission, and courts in carrying administration forward. He does not undertake to analyze exhaustively such matters as the extent to which the Commission has barred evidence as unreliable or irrelevant, nor does he examine the question of the extent to which the Commission has relied upon its own previous decisions and utterances in deciding cases. The latter task has been interestingly performed elsewhere, together with others which descend farther into the realm of practice than it is necessary for Professor Sharfman to go.² On the evidence point it suffices for him to outline the limitations imposed by Supreme Court decisions³ and to illustrate the manner in which the Commission, while freed from the rules of evidence applicable to judicial proceedings, has performed its duty "to ob-

1. Book Reviews (1935) 20 ST. LOUIS LAW REVIEW 293; (1937) 22 WASHINGTON U. LAW QUARTERLY 300. The previous volumes of Professor Sharfman's study are noticed in (1935) 20 ST. LOUIS LAW REVIEW 189.

2. Interstate Commerce Commission Semi-Centennial Commemorative Issue (1937) 5 G. Wash. L. Rev. no. 3.

3. Pp. 201-211.

serve all requirements essential to the development of pertinent and trustworthy information."⁴ In similar illustrative manner the author presents a clear exposition of such matters as the interest which entitles parties to appear before the Commission, the pleadings (if they may be called that) which the Commission requires in its several varieties of procedure, and the character of hearings afforded. Statutory provisions, the practice of the Commission, and judicially imposed limitations are skillfully related to each other.

In Professor Sharfman's discussion two especially important points stand out. These are, first, the terrific load of work which the Commission has managed to carry and, second, the flexibility of the arrangements whereby its accomplishment has been made possible. In 1927-8 the Commission acted formally upon 20,553 matters, 4917 of which, including 1829 "reports," or cases, involved the exercise of discretion.⁵ Many of even the discretionary matters were acted upon by divisions or by single Commissioners, but an average of more than six Commissioners acted upon each of the 4917 such matters. Since there are eleven Commissioners, each of them had on an average to pass upon 2829 such questions during the year. In addition each Commissioner spent all or part of not less than 100 working days in hearings, travelled to and from hearings held outside Washington, participated in disposing of the routine decisions, and gave direction to the work of one or more of the Commission's administrative bureaus.

Such a record of performance is a tribute not only to the ability and devotion which, on the whole, the Government has commanded from this group of officials but also to the administrative methods which they have been enabled to employ. Not only has the Commission's staff served the members with efficiency and accuracy but, with a minimum of control by mandatory provisions of statutes, the Commission, unlike the courts, has been empowered to adopt extensive delegation of functions to divisions, individual commissioners, and committees of employees⁶ and, in addition, to evolve four distinct, abbreviated modes of procedure besides the formal procedure involving hearings.⁷ Always, however, the consent of the parties has been required to dispense with the more formal methods, and the possibility of ultimate review by the entire Commission has been preserved. Thus the Commission has fulfilled in actuality the responsibility with which it has been legally charged. Even stipulations and compromises have been carefully examined for the purpose of testing their conformity to the statutes,⁸ for the Commission is administering an Act and not merely deciding cases.⁹ Thus the administrative process as developed by the Commission has resulted in "sound and realistic adjustment of complex relationships in the public interest" and "through the employment of quasi-

4. Pp. 212-220.

5. P. 293.

6. P. 58 ff.

7. Pp. 170 ff., 221 ff.

8. Pp. 173, 197.

9. Compare the somewhat sad results of consent decrees under the anti-trust acts.

judicial methods * * * has flexibly but successfully safeguarded all essential private rights."¹⁰

The utility of judicial review comes in for its share of recognition at Professor Sharfman's hands. Although that review has been exercised with restraint, it has been "an effective bulwark against abuse of administrative power."¹¹ And the Commission has "consistently accepted" court decisions "as authoritative guides to future action" and thus has developed its powers "as an organic expression of the legal structure as a whole."¹² In the *Atchison Railway* case¹³ the Supreme Court "imposed a salutary check upon the subversive possibilities" of the Commission's "striking departure from its usual meticulous regard for the basic rights of the parties."¹⁴ The author makes no mention of possible undue extension of judicial review by reason of the dictum in the recent *Baltimore and Ohio* case,¹⁵ whereby the district courts are empowered under some circumstances to receive additional evidence in injunction proceedings against the Commission's orders.

Professor Sharfman has both objections and suggestions in regard to the reorganization of the Commission and the reform of its work. Although he advocates greater boldness by the Commission in imposing rate reductions for the purpose of stimulating traffic and of scaling down capital obligations,¹⁶ he questions the wisdom of introducing a permanent Coordinator of Transportation into the regulatory picture for the purpose of planning and promoting improved methods in the industry. That, he feels, would invade too seriously the sphere of management to be justified under a system of private ownership and public regulation. On the whole he agrees with the Commission in opposing Commissioner Eastman's proposal in his report as temporary Federal Coordinator, for a Control Board of limited membership to unify the work of divisions of the Commission whose members, except for the chairman of each division, would not participate, as now, in the conduct of the Commission's entire affairs.¹⁷

With ample justification, Professor Sharfman abandons his usual calm mood in castigating the proposal of the President's Committee on Administrative Management to separate the "administrative" from the "judicial" aspects of the Commission's work, subject the former to departmental control, and insulate the latter in a judicial division which shall be only nominally in the department. Against the background of Professor Sharfman's careful study and realistic appraisal, the "astonishingly sweeping and intemperate terms" of the Committee's denunciation of the independent commissions, including the Interstate Commerce Commission, condemn them-

10. P. 255.

11. P. 383.

12. P. 384.

13. (1932) 284 U. S. 249.

14. P. 237.

15. (1936) 298 U. S. 349. This case should be read in conjunction with *St. Joseph Stockyards Co. v. United States* (1936) 298 U. S. 33.

16. Pp. 377-378.

17. Pp. 337-340.

selves; and the author allows them to do so by spreading them over two pages of his book.¹⁸ The crude conceptualism and ignoring of facts on the part of the Committee in attempting to segregate "policy determination" from "adjudication" and in its assertion of "irresponsibility" on the part of this Commission and of others, will carry no conviction to Professor Sharfman's readers. To the author it is clear, as it should be to those who follow his exposition, that the "quasi-judicial methods" employed in the performance of the Commission's regulatory functions¹⁹ do not imply that the Commission is there merely judging disputes in the light of previously formulated policy. The policy grows as conditions arise which need to be dealt with. Hence it is "grounded in the realities"²⁰ and the decisions are "equitable in substance,"²¹ at the same time that regulatory policy is stable in comparison with political control. As contrasted with these characteristics of the present set-up, reorganization based upon dogma has little to offer.

As the author brings out, the Commission is confronted at present with an enormously increased load because of the addition of the function of regulating transportation by motor vehicles. It is falling rapidly behind in its docket in that branch of its work. Not only will new administrative expedients have to be devised, but it is of the highest importance that adequate appropriations for accounting and staff services be made. At previous periods in its history the Commission has been seriously hampered by stringency in this respect.²² The present situation is not promising.²³ Thus, ironically, the Commission, devotedly and efficiently rendering an essential service to the nation, finds itself condemned in a report to the Chief Executive and inadequately supplied with funds by the people's representatives at a time when the need for governmental planning and control is being stressed as never before. It has, on the other hand, consistently commanded the confidence and respect of Congress and the courts and of the community at large. Therein must lie the reward of its members, as well as some assurance that the demos will not fail to profit from this unique achievement in the art of government. Its counterparts, as everyone knows, are now numerous in the land.

RALPH F. FUCHS.†

THE MIND OF THE JUROR. By Albert S. Osborn. Albany, New York: The Boyd Printing Company, 1938. Pp. xv, 239.

This book, by the well known author of *Questioned Documents* and *The Problem of Proof*, will be appreciated by all interested in the administration of justice.

As suggested in the preface, the main interest of many pleaders "appears

18. Pp. 263-265.

19. P. 269.

20. P. 365.

21. P. 375.

22. P. 288 ff.

23. P. 299.

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